In The United States Circuit Court of Appeals

IN AND FOR THE NINTH CIRCUIT

MARGARET ROSBOROUGH and ALICE BARBEE WICK, *Appellants* vs. CHELAN COUNTY, WASHINGTON, a municipal corporation, *Appellee*	No. 6429

and

ALICE BARBEE WICK, THEODORE S. TETTEMER and JANE DOE TETTEMER, his wife, (true Christian name unknown) *Appellants* vs. CHELAN COUNTY, WASHINGTON, a municipal corporation, *Appellee*	No. 6430

PETITION FOR REHEARING

Upon appeal from the United States District Court for the Eastern District of Washington, Northern Division.

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Comes now the appellants, Margaret Rosborough and Alice Barbee Wick in case No. 6429, and Alice Barbee Wick, Theodore S. Tettemer and Jane Doe Tettemer, his wife, in case No. 6430, by their attor-

neys, Berkey & Cowan, and petition the above entitled court for a rehearing in the above entitled cases for the reasons and upon the grounds following:

I.

That the Court fails to fully take into consideration the position of appellants in not appearing at the trials on necessity and for damages. The court seems to take the position in its opinion that by reason of such failure to appeal and make objections to the evidence or make proper motions in regard thereto, that they cannot now take advantage of the same, or be placed in a more favorable position by reason of their failure to make such appearance. Our contention, however, in that regard is this, that having made and preserved special appearances in the above cases, which position is upheld by the Court in its opinion, it is incumbent upon and necessary for the appellee to affirmatively prove all facts necessary to sustain the jurisdiction of the Court to render a judgment or decree that would be binding upon these appellants and describe the property with reasonable certainty. This we submit they have not done, and we have sent up the evidence offered as a part of the record to show such facts. See Trans. pp. 56-93.

DESCRIPTION — CAUSE NO. 6429

The call of six degrees in the description in controversy is not such an error as can be readily demonstrated from the balance of the description for the reason that a curve of six degrees can have an angle of 47° 1′, although the distance in feet would not be 293.9, and for the further reason that a curve of six degrees could have a distance of 293.9 feet but the angle would not be 47° 1′. In short, that any one of the three might be the erroneous one, and there would be as much reason to correct one as the other, and that the only way a surveyor could know what was the real intention of the description would be with the aid of some other evidence than that furnished by the description. That the only way the erroneous quantity can be found is by plotting the same up to an accurate scale and by a closure with the boundary lines or termini mentioned. The description does not furnish the data from which the greater curve of sixteen degrees may be computed, as stated in the opinion, without such plotting and necessary tie-ins.

Mowbray vs. Allen, 58 N. J. L. 315, 33 A. 199.

> "Where the courses and distances of the return of the surveyors lay a public road through dwelling houses, the proceeding is absolutely defective, notwithstanding the map of the surveyors shows the road to be to one side of the

dwellings."

"One of the reasons relied upon is that the road, by said return, is laid through several dwelling houses. This is the admitted effect of following the courses and distances of the return.

"The answer is that there is a mistake of 99 feet in one course, which makes the next course right through a row of houses and the suggestion is that this error be corrected by the map which shows a line running to one side of instead of through the dwellings.

"Where, however, the prosecutor is injured by an unlawful return it is no answer to say that the map does him no injury. This proceeding brings up primarily the return, and if it, on its face, discloses illegality, such that the road should not be left to depend upon it, the proceeding is absolutely defective.

"Even if the maps are referred to, but not made a part of the petition, they are not sufficient to aid a defective description." Detroit S. & D. Ry. Co. vs. Gartner, 95 Mich. 318, 54 N. W. 946.

DESCRIPTION — CAUSE No. 6430

This Description is open to the same objection as the other in that it requires a reference to some map or survey to determine whether the N. E. cor. of the SW¼ of the SW¼ of Sec. 3, is in the center of the proposed roadway or not. This being not an established Gov't Cor. but a 1/16 corner it not marked on the ground, and unless surveyed, may or may not coincide with the road survey. All, or most all, sections of land in mountainous country, such as this, vary in size, from a few feet to as many as forty feet. In as much, however, as the survey as published in the notice, and this is the jurisdictional part of the controversy, attempts to establish this beginning

point by courses and distance, which are admittedly in error, they have or can have no better rights than their notice affords.

Toledo Etc. Ry. Co. vs. Munson, 57 Mich. 42, 23 N. W. 455.

"A judgment for the condemnation of land for the use of a turnpike company should, undoubtedly, describe the land condemned so that it may be assertained and identified without extrinsic evidence."

Rising Sun Etc. Turnpike Co. vs. Hamilton, 50 Ind. 580;

Mathias vs. Drain Com'r., 49 Mich. 465, 13 N. W. 818;

Nat. Docks Etc. Connecting R. Co. vs. United Jersey Ry. Co., 52 N. J. Eq. 366, 28 A. 673.

20 C. J. 935, 936.

". . . Where the notice refers to and describes another instrument containing a description of the property, the latter becomes a part of the notice, but a reference to a map on file in some public office has been held insufficient."

In re Central Park Commrs., 51 Barb. (N. Y.) 277.

Nichols on Eminent Domain, p. 1054.

"Under Remington Code 1915, 921, providing that petition for condemnation shall describe the lands with reasonable certainty, it should describe them with all the certainty possible to determine the land condemned, and to enable the jury to know how much is to be paid for."

Wash. State vs. King Co. Superior Court, 102 Wash. 331, 173 pac. 186.

"The land taken for the use of the railroad must be so described either in the petition or report that its identity cannot be questioned — and where the proceedings are defective in this respect they will be reversed."

Pa. R. R. Co. vs. Porter & Porter, 29. Pa. 165.

"In condemnation proceedings by a railroad company the lands sought to be condemned must be within the located route of the condemning company and must be described with certainty so that they shall be capable of definite and unmistakable ascertainment. Uncertainty in this respect will vitiate the proceedings."

National Docks & N. J. Ry. Co. vs. State, 53 N. J. L. 217, 21 Atl. 570, 26 Am. St. Rep. 421.

II.

We contend that the petition and notice are fatally defective and insufficient to confer jurisdiction upon the Court, over the objection and special appearances of appellants, and cannot be aided or cured by the surveyor's maps subsequently offered in evidence.

The Court cannot consistently refuse to consider the evidence on the part of appellants, because not brought up by bill of exceptions, and on the other hand aid the defective descriptions of appellee by reference to the maps offered in evidence.

In addition to the lack of jurisdiction obtained over appellants or their lands, it is submitted that the lands proposed to be condemned have not been so condemned because the descriptions were not amended during the progress of the trial. The erroneous descriptions were maintained through the proceedings of the trials, including the Findings of the Court, the Judgments on Verdict and the Decrees of Appropriation. It cannot therefore be pretended that the description appearing on a map offered in evidence, and not appearing in the judgments and degrees, could bind appellants or their lands. Nichols on Eminent Domain, p. 1073.

In the case of the land described in Cause No. 6429 the error is all the more flagrant because the party to whom this property had been conveyed by appellant, Margaret Rosborough (Wick having no interest whatever therein), was not a party to the proceedings and did not appear therein, and therefore no jurisdiction can be pretended to have been acquired over this owner nor her lands by reason of a notice published prior to her acquisition of title which notice had failed to describe the land proposed to be condemned and which it is claimed was designated in a map offered in evidence and not a part of the published notice.

The maps or surveyor's plats are no part of

either the petition or notice, and are not made a part thereof by reference. The published notice upon which jurisdiction, if acquired at all, is based, does not refer to the maps or plats, and contain the erroneous descriptions. Trans. pp. 24 to 30.

If it was proper for the Court to consider the maps, it was proper for it to consider the commissioners' proceedings and the improper certification of the same, because not only were the commissioners' proceedings an exhibit in the trials on use and necessity just as the maps were, but the proceedings of the commissioners were a part of the record, being an essential part of the preliminary steps prior to condemnation, and upon which the validity of the condemnation proceedings must of necessity depend.

It is absolutely essential that the property described in the notice should not only be so described that a layman could locate it without the necessity of resorting to highly technical mathematical formula or hypothesis, but also that the property to be taken would appear from the published notice itself and not by reference to some other source of information.

Where a description is wrong it is the same as service on the wrong person. In such a case, in

order to bring the land proposed to be condemned within the jurisdiction of the Court it is necessary that the notice be republished with the correct description, excepting where the owner has appeared generally, in which case petitioner might ask leave of the Court, before trial, to amend its petition. In the present cases, not only was there no general appearance and no leave to amend, and no judgment and decree covering the land desired to be appropriated, but appellants' motions to make more definite and certain and for bills of particulars were denied by the Court. (Tr. p. 45).

Even in a case where jurisdiction has been acquired over the persons of the property owners by a general appearance, a petitioner having opposed motions, timely made, to make more definite and certain and for bills of particulars, would be estopped from asking for leave to amend, subsequent to the trials.

This being a proceeding in rem, and not in personam, no greater or better right can be obtained than the notice affords.

The Court, having no jurisdiction of the owner, it is the land that is proceeded against and not the individual, and if the wrong land is described, then

it is the same as if the wrong individual had been served.

The owner is not required to look beyond the published notice to see if her property is affected, or employ a technical surveyor to untangle an erroneous description by making complete maps and trying to correct and reconstruct the description contained in the published notices on the basis of these plats and various highly technical hypothesis and engineering formulas. This is especially true of the shortness of the notice to non-residents required by the statutes of the State of Washington.

The fatal weakness of the argument regarding the map is that even after these maps had been introduced in evidence the findings of the trial Court, the judgments in condemnation and the decrees of appropriation all describe the land just as it had been wrongly described in the notice of condemnation and the petitions.

Even had the maps been expressly referred to in the published notices, they would have been unavailing to give the Court the necessary jurisdiction, in view of the fact that the maps were not published, and in addition, the judgments and decrees described the land not as shown by the maps,

but as it was wrongly described in the notices and petitions.

In other words, proceedings in condemnation are in derogation of the common law, and are to be strictly construed and as stated in the case of Dally vs. Missouri Pacific Railway Co., 170 N. W. 888, 103 Neb. 219, inaccurate statements in the petition materially affecting the dimension of the land affected, will render condemnation proceedings void that are held thereunder. In the Elizabeth Rau case, 70 N. Y. 191, only an inch or two was sufficient to vitiate the description, and they held extreme accuracy was essential in condemnation proceedings.

20 C. J. 905. 20 C. J. 724.

Jacobson vs. Superiior Court, Sonoma County (Cal.), 219 Pac. 986, 29 A. L. R. 1399.

Connecticut vs. McCook, 109 Conn, 147 Atl. 126.

Pontiac Improvement Co. vs. Cleveland (Ohio), 135 N. E. 636, 23 A. L. R. 866.

Cooley's Constitutional Limitations, 8 Ed. Vol. 2, p. 1120.

III.

There is this difference between the cases at bar, and the Wick vs. Chelan Electric Company, 280

U. S. 108, in that there was only a special appearance in the cases at bar and in the Chelan Electric Company case, they participated in the trials, both on use and necessity and on damages, and which no doubt was a controlling factor in the latter case.

More than this, it is submitted that apparently the following points were overlooked by appellant in the Wick case (Supra):

The statute requires publication once a week for two successive weeks in "any" newspaper published in the county. This statute is unconstitutional because it cannot be construed as requiring 14 days to elapse between the first and second publications.

It would be impossible to advertise even in a newspaper of daily circulation once a week for two successive weeks and give 14 days' notice, because 14 days could not elapse between the first and second publications, even if the first publication were on a Sunday.

The statute therefore must be construed as meaning that any publication once a week for two successive weeks would be a compliance therewith. Accordingly, publication on a Saturday of one week and Monday of the next week would be compliance with the statute. Therefore, the minimum amount of published notice petitioner could be re-

quired to give under the statute would be 3 days. For instance, Saturday of one week and Monday of the succeeding week, assuming that a Sunday publication would be improper.

In the case of a paper published weekly, and "any" newspaper would include a weekly paper, only 7 days could elapse between the first and second publications.

In addition, the Supreme Court of Washington has decided that the first publication amounted to service and that the 10 days required to be given resident owners had no application to non-residents.

Thus the amount of notice following the first publication would be dependent entirely upon what the Court considered reasonable and would necessarily vary in each case.

There is here an obvious discrimination against non-residents, and to that extent there is a further violation of Amendment Article Fourteen and of Sec. 2 of ART. IV of the Constitution of the United States.

Although a non-resident would require more time especially if he desired to remove to a Federal Court, he is discriminated against, being allowed no

definite time whatever under the statute in which to appear and defend.

Actual notice will not cure defect in statute.

> James vs. West Puerto de Luna Community Ditch, 23 N. M. 495, 169 Pac. 309;
>
> "It is not what is done under a statute in a given case, but it is what may be done, that determines its constitutionality."
>
> Lacey vs. Lemmons, 22 N. M. 54, 159 Pac. 949, 951.

This discrimination is the more apparent when the vast area of Chelan County is taken into consideration and the fact that the notice may be published in any newspaper in the county, and that in cases of intended removal to a Federal Court, three to ten days' notice of application for such removal is required to be given opposing counsel, under the laws of the State of Washington.

Regarding the shortness of the notices of appellants of trials, it is submitted that had appellants asked for continuance they might have jeopardized their special appearances. Numerous cases are to the effect that application for a continuance by one specially appearing, waives the special appearance.

> Bankers Life Assoc. vs. Shelton, 84 Mo. App. 634.

Marye vs. Strouse, 5 Fed. 494.

IV.

We respectfully call the Court's attention to the fact that no mention is made by the Court in its opinion on a number of the points raised by appellant in the Brief and more in particular to the following points:

(a) That no jurisdiction is shown over appellant Alice Barbee Wick, no land belonging to her being described in the Notice and Petition or in the Findings, Judgments or Decrees, or in any other portion of the proceedings.

(b) That there was no segregation or separate statement of damages as to the various defendants or their lands, in spite of the fact that no two of them were jointly interested in any of the lands described.

(c) That there was a taking or pretended taking of the fee where an assessment only was sufficient.

(d) That there was a failure to make any offer of settlement before bringing the condemnation proceedings.

(e) That the commissioner's proceedings were insufficient to support the connation proceedings.

COOLEY'S CONSTITUTIONAL LIMITATIONS

8th Ed. Vol. 2. p. 1193:

"As a general rule, the laws for the exercise of the right of eminent domain do not assume to go further than to appropriate the use, and the title in fee still remains in the original owner. In the common highways, the public have a perpetual easement, but the soil is the property of the adjacent owner, and he may make any use of it which does not interfere with the public right of passage, and the public can use it only for the purposes usual with such ways. And when the land ceases to be used by the public as a way, the owner will again become restored to his complete and exclusive possession, and the fee will cease to be encumbered with the easement.

Failure to negotiate and agree on settlement before starting condemnation.

Toledo Etcc. Ry. Co. vs. Detroit Ry. Co., 62 Mich. 564, 29 N. W. 500;

20 C. J. 893

"In most jurisdictions by express provision either in the constitution or by statute, and in some cases by both, proceedings to condemn property cannot be instituted unless such an attempt has been made.

"Such a provision is mandatory and not merely directory, and the condemnation proceedings are absolutely void in case no at-

tempt is made before beginning them, to come to an agreement with the owner.

"The attempt and failure to agree must be alleged, and proved, and this must appear on the face of the record.

"In order to satify the statutory requirement here must be a bona fide attempt to agree. There must be an offer made honestly and in good faith, and a reasonable effort to induce the owner to accept it."

Easement and not a fee granted by condemnation, Newton vs. Mfg. Ry. Co., 115 Fed. 781, 55 C. C. A. 599.

Where petitioner is authorized to condemn an easement only, the instrument is bad if it seeks to appropriate the fee.

Great Western Natural Gas Co. vs. Hawkins, 30 Ind. A. 557, 66 N. E. 765.

We respectfully submit that appellants are not seeking redress upon merely technical grounds, but because their substantial property rights as citizens of another state are being invaded by appellee, and the Court should be zealous to uphold those rights.

Boyd vs. United States, 116 U. S. 616.

We suggest to the Court that any citation against our position would not be in point unless the case involved a non-resident served only by publication, and specially appearing, and not participating in the trials, and no amendment of the description had

before judgment, and description in judgment and decree different from same in published notice as explained by a map filed in evidence.

We earnestly submit that the appellants are entitled to a rehearing in these cases.

Respectfully submitted,
BERKEY & COWAN,
Attorneys for Appellants.

I, the undersigned, one of the attorneys for appellants, do hereby certify that in my judgment the above and foregoing petition for rehearing is well founded and that the same is not interposed for delay.

CHAS. F. COWAN.

STATE OF WASHINGTON, }
County of SPOKANE } ss.

Chas. F. Cowan, being first duly sworn, deposes and says: I am one of the attorneys of record for appellants and the petitioners for rehearing in the above entitled cases now pending in the Circuit Court of Appeals for the 9th Circuit. That I served true and duly certified copies of said petition for rehearing in said cases upon J. A. Adams and Sam M. Driver, attorneys of record in said appeals for appellee, by depositing in the United States post-office at Spokane, Washington, on the 21st day of November, 1931, three copies of said petition addressed to J. A. Adams and Sam M. Driver, attorneys for Chelan County, Washington, Commercial Bank Building, Wenatchee, Washington, with postage fully prepaid thereon. That there is a regular mail communication between Spokane and Wenatchee, Washington.

CHAS. F. COWAN.

Subscribed and sworn to before me this 21st day of November, 1931.

JAMES A. LYBECKER.

Notarial Seal.
Commission expires
May 16,1933.

Notary Public in and for the State of Washington, residing at Spokane.